

1
2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 MICHAEL DINGMAN,
7
8 Plaintiff,
9
10 v.
11
12 JO ANNE B. BARNHART,
13 Commissioner of Social Security
14
15 Defendant.

No. C04-2360-MJP

ORDER ON DEFENDANT'S
OBJECTIONS TO REPORT AND
RECOMMENDATION ON AWARD
OF SOCIAL SECURITY DISABILITY
BENEFITS

This matter comes before the Court on Defendant's objections to the Report and Recommendation ("R&R") from Magistrate Judge James Donohue reversing the Social Security Administration's ("SSA") denial of Social Security Disability Insurance Benefits ("DIB"). Having considered Defendant's objections to the R&R and the administrative record from the SSA, the Court hereby ACCEPTS the Magistrate's recommendation, REVERSES the denial of benefits by Defendant Jo Anne Barnhart, Commissioner of the SSA, and REMANDS the matter for an award of benefits.

18 **BACKGROUND**

19 Plaintiff Michael Dingman applied for Disability Insurance Benefits and Social Security
20 Insurance in March and April of 1999. The Administrative Law Judge ("ALJ") applied the SSA's five-
21 step analysis, see 20 C.F.R. § 404.1520, and concluded that Plaintiff had "severe impairments" but did
22 not meet a Listing as required for a finding of disability at step three. At step five, the ALJ found that
23 Plaintiff could not perform his past work as a construction worker but could perform "light work and
24 simple, repetitive tasks" currently available in significant numbers in the state and local economy. The
25

1 ALJ upheld the Disability Determination Services (“DDS”) denial of benefits. (Administrative Record
 2 (“AR”) at 38, 40).

3 Upon review of the case, the Magistrate disagreed with the ALJ and recommended remand for
 4 the calculation of benefits based on the ALJ’s errors at step three and step five. In the alternative, the
 5 Magistrate recommended remand to address errors in the step two “severity” analysis of additional
 6 medical complaints made by the Plaintiff. (R&R at 21-22).

7 Defendant’s Objections attribute several errors to the Magistrate’s recommendation. 1) The
 8 Magistrate erred in finding the Plaintiff disabled under listing 12.05(C). 2) The Magistrate erred in
 9 finding that the Commissioner did not meet her burden of proving available employment for the
 10 Plaintiff. 3) The Magistrate erred in his “severity” analysis because he did not give adequate deference
 11 to the ALJ required by the substantial evidence standard of review.

12 DISCUSSION

13 The Court reviews de novo the Magistrate’s recommendation to reverse the ALJ’s denial of
 14 benefits. However, the Court can only set aside the denial of benefits when the ALJ’s determination is
 15 based on legal error or is not supported by substantial evidence in the record as a whole. Smolen v.
 16 Chater, 80 F. 3d 1272, 1279 (9th Cir. 1996). “Substantial evidence is relevant evidence which,
 17 considering the record as a whole, a reasonable person might accept as adequate to support a
 18 conclusion.” Flaten v. Sec’y of Health & Human Servs., 44 F. 3d. 1453, 1457 (9th Cir. 1995).
 19 Furthermore, where evidence is susceptible to more than one rational interpretation, the ALJ’s
 20 decision must be upheld. Thomas v. Barnhart, 278 F. 3d 947, 954 (9th Cir. 2002).

21 The claimant has the initial burden of proving disability. 42 U.S.C. § 423(d)(5), Swenson v.
 22 Sullivan, 876 F. 2d 683, 687 (9th Cir. 1989). When the claimant establishes an inability to continue
 23 with former work, the burden shifts to the Commissioner of the Social Security Administration to
 24 demonstrate that other substantial employment exists within the national economy. Swenson, 876 F.
 25 2d at 687.

1 **I. Step Three Analysis: Requirements for Listing 12.05(C)**

2 At step three of the SSA's analysis, a claimant who meets listing 12.05(C) automatically
3 qualifies for benefits.

4 Listing 12.05. Mental retardation: Mental retardation refers to significantly
5 subaverage general intellectual functioning with deficits in adaptive functioning initially
6 manifested during the developmental period; i.e., the evidence demonstrates or
7 supports onset of the impairment before age 22. The required level of severity for this
8 disorder is met when the requirements in A, B, C, or D are satisfied...

9 (C) A valid verbal, performance, or full scale IQ of 60 through 70 and a physical or
10 other mental impairment imposing an additional and significant work-related limitation
11 of function.

12 20 C.F.R. Pt. 404, Subpt. P, App. 1, §12.05.

13 In order to qualify for 12.05(C) the claimant must meet the IQ and impairment requirements of
14 subsection (C) in addition to the "capsule definition" requirements of subaverage intellectual
15 functioning and deficits in adaptive functioning in 12.05. Defendant does not contest the fact that
16 Plaintiff has a valid IQ score of 70 and an additional physical impairment. The objections to the
17 Magistrate's step three analysis focus on the introductory paragraph of 12.05.

18 **A. Formal Medical Diagnosis**

19 Defendant argues that 12.05 implicitly requires a formal medical diagnosis of mental
20 retardation which Plaintiff lacks. Defendant relies on a general explanation of the use of the listings. "If
21 the medical findings needed to support a diagnosis are not given in the introduction or elsewhere in the
22 listings, the diagnosis must still be established on the basis of medically acceptable clinical and
23 laboratory diagnostic techniques." 20 C.F.R. § 404.125(c), 416.925(c). However, the introduction to
24 the Mental Disorders listings in 12.00(A) explicitly states: "If your impairment satisfies the diagnostic
25 description in the introductory paragraph and any one of the four sets of criteria, we will find that your
impairment meets the listing." 20 C.F.R. Subpt P, App. 1, §12.00A.

26 Based on the plain language of the introduction specific to Mental Disorders in 12.00(A), the
27 Magistrate correctly found that only the criteria of 12.05 needs to be met, with no additional burden of
28

1 a formal medical diagnosis. Plaintiff does not need a formal medical diagnosis to qualify as mentally
2 retarded under 12.05.

3 **B. Legal Requirements for Mental Retardation**

4 The “capsule” definition of mental retardation contains two requirements that must manifest
5 before age 22: 1) significant subaverage general intellectual functioning, and 2) deficits in adaptive
6 functioning. See 20 C.F.R. Pt. 404, Subpt. P, App. 1, §12.05.

7 **i. Subaverage General Intellectual Functioning**

8 Defendant concedes that “there is no issue about whether Plaintiff has subaverage general
9 intellectual functioning” and further admits that the medical expert testified that Plaintiff’s intellectual
10 functioning had likely been stable over his lifetime. (Def.’s Objections at 5). Based on these
11 admissions, Plaintiff meets the first prong of the 12.05 general definition.

12 **ii. Deficits in Adaptive Functioning**

13 The legal standard for the second prong of the “capsule definition” is uncertain. The
14 preponderance of the circuits, including the Ninth Circuit have not reached the issue. The Eleventh
15 Circuit has addressed the complete definitional requirements for 12.05 and adopted a broad
16 presumption that “a claimant need not present evidence that she manifested deficits in adaptive
17 functioning prior to the age twenty-two, when she presented evidence of low IQ test results after the
18 age of twenty-two.” Hodges v. Barnhart, 276 F. 3d 1265, 1266 (11th Cir. 2001). However, the
19 Magistrate did not rely on the broad presumption of Hodges but analyzed adaptive deficiencies
20 separately from IQ.

21 Because the standard for determining “deficits in adaptive functioning” remains undefined, the
22 Magistrate and Defendant provide their own definitions which do not differ significantly. Defendant
23 uses the DSM-IV explanation of adaptive functioning: “how effectively individuals cope with common
24 life demands and how well they meet the standards of personal independence expected of someone in
25 their particular age group, sociocultural background and community setting.” (Def.’s Objections at 6).

1 The Magistrate analyzes adaptive functioning in terms of “an individual’s ability to function
 2 academically, care for themselves, and live independently” as defined by the American Psychiatric
 3 Association. (R&R at 14).

4 **C. Factual Dispute Regarding “Deficits in Adaptive Functioning”**

5 The ALJ based his finding that Plaintiff did not have the requisite adaptive functioning deficit
 6 on several sources cited throughout his opinion. The Medical Expert (“ME”) testified that the Plaintiff
 7 did not meet any of the listings and his “work history did not suggest any problems with adaptive
 8 functioning; as long as he could perform physically, he could adapt.” (AR at 38). A reviewing DDS
 9 psychologist found “insufficient evidence of a mental disorder...he had no difficulty with day-to-day
 10 functioning or social interaction.” (AR at 39). A social security interviewer reported that Plaintiff
 11 showed no difficulties with concentration or understanding during their telephone session. (AR at 39).
 12 Finally, Plaintiff’s daily life demonstrated that he “has been able to take care of his family, which can
 13 be mentally and physically challenging, without much assistance.” (AR at 38).

14 The Magistrate disagreed with the ALJ’s findings on Plaintiff’s adaptive functioning for three
 15 major reasons. 1) Plaintiff has a history of special education; 2) his work history shows an inability to
 16 maintain unskilled jobs after he could no longer perform as a construction worker; 3) the ALJ’s
 17 reliance on the ME’s opinion was improper because the opinion was deficient. The Defendant objects
 18 to the findings due to a lack of evidence of deficits in adaptive functioning because case law does not
 19 hold that special education is sufficient to prove deficiencies. Plaintiff was also able to hold a job and
 20 earn significant income. The Defendant further argues that the ME’s testimony was not deficient and
 21 properly accepted over the treating and examining physicians.

22 The Magistrate looks to the Plaintiff’s history of special education classes as only one factor
 23 for evaluating Plaintiff’s adaptive function, relying on Ware ex rel. v. Shalala, 902 F. Supp. 1262, 1271
 24 (E.D. Wash. 1995). Although Ware does not explicitly treat special education classes as proof of
 25 adaptive functioning deficiency, such an educational history was an important factor in the claimant’s

1 background which might show adaptive deficiencies. 902 F. Supp. at 1271. See also, Markle, 324 F.
2 3d 182, 189 (3d Cir. 2003) (case was remanded for development of factors including claimant's
3 participation in special education until ninth grade when he left school). In addition to special
4 education, the Magistrate also considers the Plaintiff's functional illiteracy and substantial difficulties
5 with math as evidence of adaptive problems. He cites the Commissioner's approval of the use of
6 education as a factor for determining adaptive deficiencies because "12.05(C) accommodates the
7 American Psychiatric Association's analysis of mental retardation which looks to an individual's ability
8 to function academically..." (R&R at 14). Education is an indicator of a claimant's ability to function
9 academically and lead an independent life that the ALJ failed to adequately consider in his evaluation
10 of the Plaintiff's adaptive functioning.

11 In addition to education, the ALJ should have given more consideration to the specifics of
12 Plaintiff's past work history in his determination of his adaptive functioning level. The Third Circuit
13 has indicated that employment history may be valuable for proving deficiency in adaptive functioning.
14 Markle, 324 F. 3d at 189 (remanded to ALJ to develop the facts). Defendant cites Plaintiff's ability to
15 earn a decent living during the development period (before age 22) as a demonstration of adequate
16 adaptive skills. (Def.'s Objections at 7-8). However, Plaintiff could perform construction jobs only
17 because he learned the repetitive work from his uncle. Additionally, Plaintiff succeeded at his
18 construction work because he could perform the heavy labor and a friend handled the paperwork and
19 read the blueprints. (R&R at 14). Due to his inability to perform physically because of his back injury,
20 Plaintiff has been unable to hold a job. (R&R at 14). This past history demonstrates Plaintiff's severely
21 limited ability to "meet the standards of personal independence" showing deficits in adaptive
22 functioning. (Def.'s Objections at 6)

23 The Magistrate found the Medical Expert's ("ME") opinion about Plaintiff's functional ability
24 deficient because his testimony relied heavily on the Plaintiff's previous employment, showed
25 unfamiliarity with some of the testing administered, and demonstrated hesitation in his final conclusion

1 about 12.05. The ME based most of his testimony on Plaintiff's successful work history in the
2 construction industry. He testified that "the claimant's work history did not suggest any problems with
3 adaptive functioning; as long as he could perform physically, he could adapt." (AR at 38). This
4 statement ignores the fact that Plaintiff can no longer perform physically due to his back injury. In fact,
5 the ME's statement suggests that the Plaintiff cannot adapt if he cannot perform physically. This is
6 precisely the scenario at hand. The ME failed to completely consider the Plaintiff's functional ability
7 and the ALJ relied on this flawed testimony for his finding that Plaintiff did not meet the 12.05(C)
8 listing.

9 The ME's evaluation of Plaintiff's adaptive functioning was highly conclusory and equivocal.
10 When the ALJ asked if Plaintiff met 12.05 the ME responded "[w]ell...I don't feel very comfortable—I
11 don't think it's appropriate for me to make a diagnosis, just sort of on a limited basis. I mean I didn't
12 even interview him..." (AR at 653). Despite the hesitation, the ALJ relied heavily on the ME's opinion
13 that Plaintiff did not meet the 12.05(C) listing. Although the Defendant emphasizes the ME's
14 qualifications by saying he was chosen for his expertise in interpreting complex medical records, he did
15 not personally evaluate Plaintiff and his testimony does not demonstrate a command of the
16 requirements for 12.05 or confidence in his evaluation of Plaintiff's functional level.

17 Looking at the evidence of Plaintiff's difficulties as documented compared to the ME's hesitant
18 testimony, the evidence in the record as a whole does not support the ALJ's finding that Plaintiff fails
19 to meet the 12.05(C) listing. Defendant argues that none of the examining and treating psychologists
20 formally diagnosed mental retardation. However, a formal diagnosis is not a requirement of the 12.05
21 listing, and the psychologists' opinions provided lengthy descriptions of Plaintiff's problems with
22 comprehension, memory, writing, reading and math skills that portray extreme limitations. (AR at 236-
23 7). These limitations are further described in Plaintiff's testimony about his difficulties with shopping,
24 counting his change, reading road signs, finding his way to appointments and following television
25 shows and baseball on the radio. (AR at 618-19, 627-28, 644). The ALJ may have chosen to ignore

1 this troubling testimony due to concerns about credibility because “[t]he claimant’s statements
2 concerning his impairments and their impact on his ability to work are not entirely credible in light of
3 the medical reports and other evidence of record.” (AR at 41). However, much of this evidence came
4 from the ME’s testimony despite the fact that he did not evaluate Plaintiff and expressed reluctance to
5 opine on the 12.05 listing. Plaintiff’s testimony about his limitations agreed with the examining
6 physician’s opinions and should not have been disregarded.

7 Given the standard that “[s]ubstantial evidence is relevant evidence which, considering the
8 record as a whole, a reasonable person might accept as adequate to support a conclusion,” the ALJ’s
9 findings are not adequately supported. Flaten, 44 F. 3d. at 1457. Plaintiff’s testimony about his
10 limitations in daily function, Plaintiff’s educational and work history, the opinions of evaluating
11 psychologists found in the record, and the ME’s deficient testimony preclude the ALJ’s determination
12 that Plaintiff does not meet the 12.05 listing. This listing yields a finding of disability at step three and
13 requires a grant of benefits.

14 Because the step three analysis is dispositive, the Court does not reach the objections to the
15 Magistrate’s recommendations on steps two and five of the disability determination analysis.

16 CONCLUSION

17 The Court ACCEPTS the Magistrate’s recommendation and REVERSES the ALJ’s denial of
18 benefits. The ALJ’s decision against Plaintiff’s qualification under 12.05(C) was not supported by
19 substantial evidence. The case should be REMANDED for calculation and grant of benefits.

20 The clerk is directed to provide copies of this order to all counsel of record.
21

22 Dated: August 2, 2005
23

24 
25 Marsha J. Pechman

United States District Court

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ORDER - 9